

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY JOHNSON,

Defendant-Appellant.

UNPUBLISHED

March 16, 2006

No. 255258

Wayne Circuit Court

LC No. 04-000571-01

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant's convictions arose from the shooting death of Darius Tatum on the afternoon of November 4, 2003. The trial court sentenced defendant to life in prison without parole for the murder conviction, 38 months' to five years' in prison for the felon in possession of a firearm conviction, and two years' in prison for the felony-firearm conviction. Because we are not persuaded by any of defendant's argument on appeal, we affirm.

Defendant first argues that the police unlawfully arrested him in his home because either the police did not obtain a warrant or because the police fraudulently obtained a warrant to search his home. Police are required to protect a defendant's privacy rights in his home even if there was probable cause to arrest him. *People v Johnson*, 431 Mich 683, 691; 431 NW2d 825 (1988). Because defendant did not raise these issues in the trial court, we review them for plain error. *People v Green*, 260 Mich App 392, 396; 677 NW2d 363 (2004). To avoid forfeiture under the plain error rule, defendant must initially satisfy a three-part test: (1) there was an error, (2) the error was clear or obvious, and (3) the error impacted substantial rights by affecting the outcome of the proceedings. If the defendant satisfies the test, reversal is warranted only if the error also resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant argues that a notation on the bindover certification sheet in the lower court file, which reads "NO WARRANT," is evidence that the police did not obtain a warrant. However, the meaning of this notation is merely administrative since the packet sent to the circuit court after the preliminary examination did not include a copy of the warrant. In fact, the

lower court file includes a warrant dated December 5, 2003 to search 10149 Britain Street which was undisputedly defendant's home when he was arrested. Further, Officer Gerald Thomas testified that police entered defendant's home with a warrant.

In the alternative, defendant argues that the warrant was invalid and could not justify the search of the home and his subsequent arrest, because it was based on "fabrications." The record reflects that the affidavit in support of the warrant states that Sheryl Trent told officers she heard defendant "bragging about shooting a guy" on West Philadelphia Street on November 4, 2003, and that she had seen guns in defendant's home. The affidavit also states that police were investigating Tatum's shooting, which occurred at 4311 West Philadelphia Street.

An affidavit in support of a warrant may contain hearsay. *People v Davis*, 191 Mich App 422, 425; 479 NW2d 6 (1991). When the information is supplied by a named person such as Trent, the affidavit must contain "affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information." MCL 780.653(a); *Id.* Furthermore, a search warrant may be issued if police have conducted an independent investigation to verify the information which is supplied. *Davis, supra* at 425-426. "[T]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *People v Hawkins*, 468 Mich 488, 502 n 11; 668 NW2d 602 (2003), quoting *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983).

The affidavit reveals that Trent had personal knowledge of the conversation she reported to police since she was the one who heard it. Further, Trent included details about the crime including the correct date of the shooting as well as the street where the crime occurred. Also lending credence to her statements is the fact that the police were already investigating a crime that occurred on that date at that location. For these reasons, the magistrate properly issued the search warrant.¹ In any event, proof that an arrest was illegal does not divest the court of jurisdiction or entitle a defendant to dismissal of the charges against him. *People v Dalton*, 155 Mich App 591, 597; 400 NW2d 689 (1986). Rather, the sole remedy for an illegal arrest is the suppression of evidence obtained from a defendant following the arrest. *Id.* Since the record reflects that the only admitted evidence gleaned from the search and arrest was defendant's own exculpatory statement to police, defendant has not shown plain error impacting substantial rights. *Carines, supra* at 763.

Defendant also argues that error occurred because the police interrogated him outside the presence of an attorney despite his request that counsel be present. Defendant has forfeited review of whether he waived his right to counsel because he has provided no evidence that the police failed to inform him of his rights before beginning the interrogation, and thus has not shown plain error. *Carines, supra* at 763. In fact, the record shows that Officer Karen Miller testified that defendant did indeed sign a waiver. Regardless, defendant does not argue that any

¹ Defendant does not raise the issue whether this warrant to search the premises was sufficient to justify his arrest while in the home.

of the information he provided to police—which in fact established his alibi—should have been excluded at trial as a result of an improper interrogation. *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004) (statements made during interrogation are inadmissible if a defendant does not knowingly waive his Fifth Amendment rights).

Next, defendant claims that the trial court erred by admitting both irrelevant and prejudicial testimony by witness Trent and Officer Thomas. Defendant preserved some of his claims by objecting at trial and specifying the same ground for objection that he now asserts on appeal. MRE 103(a)(1); *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We review the preserved claims for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court may be said to have abused its discretion only when its apparent reasoning is palpably violative of fact and logic, or, when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Jackson*, 467 Mich 272, 277; 650 NW2d 665 (2002), citing *Spalding v Spalding*, 355 Mich 382, 384; 94 NW2d 810 (1959); *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). To the extent that defendant raises these issues for the first time on appeal, we review for plain error. *Green*, *supra* at 396. Any preliminary questions of law regarding the application of a rule of evidence are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Defendant objected at trial to the trial court's admission of Trent's statements concerning the conversation she overheard between defendant and a man named Gary. Trent was defendant's neighbor and defendant had recommended Gary to her as a mechanic. When defendant brought Gary to Trent's house to work on her car on November 6, 2003, two days after the shooting, Trent overheard a conversation between Gary and defendant. At trial and now on appeal, defendant's position is that because Trent was largely able to report only Gary's statements, the conversation constituted hearsay and did not meet the criteria for an admission by a party-opponent under MRE 801(d)(2).

MRE 801(d)(2)(B) allows for the admission of "a statement of which the party has manifested an adoption or belief in its truth." *People v Solmonson*, 261 Mich App 657, 666; 683 NW2d 761 (2004). A statement is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a); *Solmonson*, *supra* at 666. Here, according to Trent, Gary "mentioned about a shooting, that the guy had fell between the houses," and that the man "died instantly." Such statements constitute assertions according to MRE 801(a)(1) particularly given that, in the context of defendant's responses, the statements impliedly assert that defendant was the shooter. Moreover, Trent stated that defendant was smiling "like it was a joke" and said, "Yeah, it was a piece of cake and I'd do it again . . . that's what happens when people owe me money." Such behavior and statements clearly manifest defendant's tacit adoption of the implication that he committed the shooting. The trial court properly allowed the testimony pursuant to MRE 801(d)(2)(B).

Defendant also argues that the trial court should have excluded evidence of this conversation based on its prejudice to defendant. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence, nonetheless, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403; *People v Fisher*, 449 Mich 441, 451;

537 NW2d 577 (1995). This does not mean that evidence should be excluded merely because it prejudices the opposing party; it is axiomatic that most evidence offered is prejudicial. *Id.* at 451-452.

The conversation at issue was critical to the identification of defendant as the shooter. The evidence was also highly relevant given that it included details explicitly matching other information known about Tatum's death: the conversation took place two days after the shooting, Trent heard either Gary or defendant mention Philadelphia Street, Tatum was found on a sidewalk which led between two houses or duplexes, and medical testimony established that the shot to the back of Tatum's head would have immediately incapacitated him, making it seem as if he had died instantly. The record evidence established that it was very unlikely that Gary and defendant were speaking about a different shooting. Because the conversation was relevant to Tatum's shooting and highly probative, the trial court did not abuse its discretion when it admitted Trent's testimony.

Defendant also argues that he was unfairly prejudiced by the introduction of "false" evidence that defendant slapped Shenita Williams, defendant's girlfriend. Trent testified that defendant slapped Williams when Williams arrived at Trent's house in a "hysterical" state at 10:30 p.m. on the night of the shooting. Trent directly observed the slap and, when Trent approached the door, defendant told Trent "not to listen to nothing [Williams] said, she's a liar." Based on the timing and context surrounding the slap, the testimony implies that Williams found out defendant committed the shooting and defendant tried to prevent her from revealing anything. As such, the evidence was relevant since *any* tendency to prove a fact in issue is sufficient under MRE 401. *People v Mills*, 450 Mich 61, 68; 537 NW2d 909 (1995). Although the evidence was prejudicial, it was not unfairly prejudicial given the high likelihood that defendant's act was related to the shooting. The slap occurred on the night of the shooting and Trent testified that Williams's behavior was unusual. Defendant's statements also revealed that he was very concerned about what Williams might say to Trent. The evidence's probative value was not outweighed by its prejudicial nature.

Defendant also argues that evidence of the slap was precluded from admission as evidence of other crimes, wrongs, or acts. MRE 404(b)(1) precludes the admission of other wrongs or acts to show the character of a person in order to prove that he "acted in conformity therewith." However, this subrule allows for the admission of evidence of other wrongs or acts when the evidence: (1) is not being offered to prove character or propensity, (2) is relevant to an issue of fact at trial, and (3) its prejudice does not substantially outweigh its probative value as evaluated under MRE 403. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). In the instant case, the act was relevant to show defendant's consciousness of guilt in committing the shooting and was admissible for that purpose. MRE 404(b)(1).

Defendant next argues that Trent's testimony that Gary raped her should not have been admitted at trial. Although defendant did not object to the admission of evidence of the rape claim at trial, defendant now asserts that the testimony was both irrelevant and highly prejudicial because it was completely irrelevant to the murder and suggested that defendant associated with a rapist. Trent testified that, on the day that she overheard the conversation, Gary and defendant left her house at about 5:00 p.m. and Gary returned later, uninvited, and raped her. She called the police from a friend's house a few hours later. On November 10, 2003, Trent gave a second statement to the Sex Crimes unit regarding the rape. Trent testified that she did not offer any

information about the shooting to the police, but only provided information when questioned after she mentioned defendant's nickname, "Tuff."² Trent previously had not wanted to get involved in the murder investigation because she "knew what kind of people was being dealt with and [she] knew the consequences if [she] came forward."

In theory, mention of the rape at trial could have been avoided because Trent's testimony could have been limited to her explanation that she approached police for reasons related to a different crime. However, defendant did not object to the admission of evidence of the rape claim and in fact centered his theory of the case around Trent's credibility and her reluctance to approach police or testify. MRE 608(b). The defense's primary inroad to attack Trent's testimony was its theory that Trent was a pathological liar who craved attention and invented the rape as a sexual fantasy. Counsel also argued that Trent invented the rape to avoid paying Gary for the repairs to her car. Defendant introduced evidence that Trent did not appear when she was originally scheduled to testify at the preliminary examination. The defense contended that her behavior constituted proof that she had lied to police and did not want to perjure herself by testifying under oath. Because defendant encouraged admission of the rape to support his theory of the case and in fact form the basis of his defense, questions regarding the rape and Trent's decision to report it became directly relevant to rebut defendant's attacks on her credibility. Therefore, evidence of Trent's rape claim did not prejudice defendant, and the court did not plainly err when it allowed admission of the evidence.

Similarly, the trial court did not err when it allowed Trent's testimony that she was threatened as a result of her decision to testify. Like the rape evidence, evidence regarding the third-party threats were introduced only to rebut defendant's attacks on Trent's credibility or character for truthfulness. MRE 608(b); see *People v Burton (After Remand)*, 433 Mich 268, 296; 445 NW2d 133 (1989) ("If our goal were to explain why the complainant recanted, evidence of threats, if present, would be relevant and probative.")

Regardless, even had the court erred, a conviction will not be reversed if the error was harmless. MCR 2.613(A); MCL 769.26. An error is harmless unless the proceedings were prejudicial or the reliability of the verdict was undermined. *People v Mateo*, 453 Mich 203, 211, 215; 551 NW2d 891 (1996). Reversal is warranted if it is more probable than not that the error affected the outcome. *People v Young*, 472 Mich 130, 141-142; 293 NW2d 801 (2005). Any prejudice caused by the introduction of testimony regarding the rape charge or the threats was not likely to have affected the outcome of the proceedings due to the weight of the evidence adduced at trial. Defendant's nickname was connected to the shooting independent of Trent's testimony and he was known to spend time in the neighborhood where Tatum was shot. Defendant acknowledged he was in the neighborhood on the afternoon of the shooting. Trent overheard defendant describe the crime to Gary and state that he was "dirty." Defendant acted unusually in the days following the shooting, stayed at home, and attempted to disassociate

² Trent specifically testified that: "When I mentioned the name Tuff, the officers had asked me how I knew him, and then she asked me a few other questions and I had told her about [the] conversation they had. That's when she put me in touch with homicide."

himself with the van involved in the shooting. Finally, defendant exhibited consciousness of guilt when he hid from police on the day he was arrested.

We briefly address defendant's argument that the prosecution tampered with evidence when it sought to suppress admission of part of a 911 tape in which a caller asserts that someone named "Charles" committed the shooting. Defendant has shown no error because the record displays that the court admitted the entire tape, which was later played for the jury, over *the prosecution's* objection. Because the entire tape was admitted, and because the parties' discussion regarding the tape's admissibility occurred outside the presence of the jury, defendant has not displayed that he was somehow disadvantaged as a result of any evidentiary error.

Defendant's next claim is that he was denied the effective assistance of counsel at trial. Defendant did not create a supplementary record at a *Ginther*³ hearing, so review is limited to facts apparent in the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To support a claim of ineffective assistance, defendant must show: (1) the representation fell below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for the attorney's error, the result of the proceedings would have been different, and, (3) the resulting proceedings were therefore fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In evaluating a claim of ineffective assistance, this Court "will not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if that strategy backfired." *Rodgers, supra* at 715.

Defendant claims that counsel was ineffective because he did not successfully impeach Trent and did not introduce evidence that Trent engaged in welfare fraud. In support of his argument, defendant provides a document purporting to be a "Case Status" printout which appears to reveal that Trent was charged with welfare fraud in 1996. Evidence of conviction of a crime involving dishonesty may be introduced to impeach a witness if the evidence is elicited from the witness or established by a public record and less than ten years has passed since the conviction occurred. MRE 609(a)(1) and (b). The printout provided by defendant is inconclusive and appears to reveal that the charge was eventually dismissed, hence defendant has not provided evidence of a *conviction* of a crime involving dishonesty. Further, the record reflects that counsel vigorously cross examined Trent, elicited testimony from Trent's son, James Krawniewski, that Trent regularly lied, and elicited testimony from Williams that Trent did not pay Gary for the car repairs. Defense counsel's impeachment of Trent did not fall below reasonable professional norms.

Defendant's remaining assertions that he was denied the effective assistance of counsel also fail. It would have been fruitless for defense counsel to have challenged the circumstances of defendant's arrest or to cast Officer Thomas's testimony as perjury. The record shows that counsel cross examined Thomas and other officers regarding their failure to further investigate

³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

another potential shooter. Counsel also cross examined Thomas regarding the various potential witnesses. Even had counsel erred in the ways cited by defendant, the outcome of the proceedings was not likely to have been affected considering the weight of the evidence.

We reject defendant's arguments that Trent's lack of credibility rendered the evidence insufficient to convict him or resulted in verdicts which were against the great weight of the evidence. In appeals challenging the sufficiency of the evidence, questions of witnesses' credibility are left to the trier of fact, not the reviewing court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999); *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). Accordingly, the jury's conclusion that Trent's testimony was credible precludes reversal based on defendant's sufficiency argument.

Defendant argues that the trial court abused its discretion when it denied defendant's motion for a new trial. We review for an abuse of discretion the trial court's decision denying defendant's motion for a new trial based on his contention that the verdicts were against the weight of the evidence. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). The test is "whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). As in appeals challenging the sufficiency of the evidence, a reviewing court generally does not overturn a jury's credibility determinations. *Lemmon, supra* at 639; *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). A court should overturn the jury's determinations only under exceptional circumstances, such as when "directly contradictory testimony was so far impeached that it 'was deprived of all probative value or . . . the jury could not believe it,' or [it] contradicted indisputable physical facts or defied physical realities." *Lemmon, supra* at 645-646 (citations omitted); *Musser, supra* 219. "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Lemmon, supra* at 647; *Musser, supra* at 219.

Our review of the record evidence reveals that the verdicts were essentially based on the jury's credibility determinations since there were no witnesses to the shooting. The record does not justify overturning those determinations when the details surrounding the shooting corroborated Trent's testimony and defendant's culpability was reinforced by acts suggesting consciousness of guilt such as defendant hiding in the attic and attempting to dispose of his van. Accordingly, the trial court did not abuse its discretion when it denied defendant's motion for a new trial.

Affirmed.

/s/ Bill Schuette
/s/ Christopher M. Murray
/s/ Pat M. Donofrio